

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT VIRGINIA
NORFOLK DIVISION**

IN RE: ZETIA (EZETIMIBE) ANTITRUST LITIGATION	Case No. 2:18-md-2836
THIS DOCUMENT RELATES TO: <i>All Actions</i>	

**MEMORANDUM IN SUPPORT OF PURCHASERS’
MOTION TO ALLOCATE TRIAL TIME**

The purchasers respectfully move the Court to allocate 60% of the scheduled trial time to the purchasers and 40% to the defendants.¹ This Court has scheduled 5 weeks for the trial of this case (ECF No. 1765). Purchasers believe that it would be appropriate to allocate 60% of the total scheduled hours to their case, and 40% to defendants for the reasons set forth below.

First, purchasers should be allocated additional time because they have the burden of proof at trial. *See, e.g., In re McKean*, No. 11-44932, 2012 WL 3074801, at *4 (Bankr. N.D. Cal. July 30, 2012) (allocating 57% of the allotted trial time to the plaintiff); Order, *In re 3M Combat Arms Earplug Prods. Liab. Litig.*, No. 19-md-2885 (M.D. Fla., entered Aug. 4, 2021), ECF No. 1852 (allocating 55% of the allotted trial time to plaintiffs); *Navellier v. Sletten*, 262 F.3d 923, 942 (9th Cir. 2001) (initially allocating to plaintiffs 57% of the scheduled trial time, and later extending the plaintiffs’ proportion of the hours). Studies of civil trials across several case categories have found that a plaintiff’s presentation averages at least twice as long as a defendant’s presentation, with plaintiffs in some categories taking three times as long on

¹ Either the Court or the parties can keep track of the time. All direct examination and cross examination conducted by a side would be charged against the total time allocated to that side. The time for openings and closings could either be included in the total time allocated or separately set.

average. *See* Dale Anne Sipes, et al., *On Trial: The Length of Civil and Criminal Trials*, Nat'l Ctr. For State Courts 9-10 tbl. 1 & 2 (1988). Commentators assessing this data have concluded that when trial time limits are imposed, it is patently unfair to split the time equally between plaintiffs and defendants. *See* Nora Freeman Engstrom, *The Trouble with Trial Time Limits*, 106 GEO. L.J. 933, 972-73 (2018) (“[C]utting trial time down the middle is often patently *unfair* because the plaintiff has the burden of proof and almost necessarily must amass more evidence than the defendant to prevail. ... But do plaintiffs really need more time than defendants? The answer, supplied by the NCSC, is a resounding yes.”); *see also* The Honorable Nathaniel Gorton, *Time Limits in Civil Jury Trials*, <https://civiljuryproject.law.nyu.edu/time-limits-in-civil-jurytrials/>.

Second, the purchasers represent a much more diverse group of parties represented by more law firms than defendants. While there are only two defendants, each represented by a primary law firm and local Virginia counsel, the purchasers consist of 25 direct purchasers, 7 retailer plaintiffs, and a class of end payor plaintiffs, represented by more than 20 law firms. While the purchasers intend to coordinate the prosecution of this case to the greatest extent possible, the different interests of the purchasers are likely to take some trial time to address. Most significantly, the direct purchasers and retailers are suing under federal antitrust law in which they are entitled to recover all overcharges on direct purchases whereas the end payor plaintiffs are suing under state laws that do not limit recoveries to direct purchasers. *Cf. Official Comm. of Unsecured Creditors v. Baldwin*, No. 10-cv-800, 2013 WL 309975, at *5-6 (W.D. Pa. Jan. 25, 2013) (in a securities case where there was a single plaintiff group, but two defendants’ groups, allocating 12 hours for the plaintiffs’ case and 15 hours (56%) to the defendants’ case).

Third, in addition to carrying the legal burden of proof, plaintiffs go first and must educate the jury about the basic facts of the case. *See Order, In re 3M Combat Arms Earplug Prods. Liab. Litig.*, No. 19-md-2885 (M.D. Fla., entered Aug. 4, 2021), ECF No. 1852 at 3 (allocating 55% of the allotted trial time to plaintiffs because they must “educate the jury early in the trial”). In a reverse payment case like this one, that is a very substantial burden. To present their claims, the purchasers will need to educate the jury on, *inter alia*, the United States Food & Drug Administration (“FDA”) approval process for brand and generic drugs including New Drug Applications (“NDAs”), Abbreviated New Drug Applications (“ANDAs”), first-to-file (“FTF”) exclusivity, and the Orange Book; Hatch-Waxman patent lawsuits; the use of authorized generics; and the economics of reverse payments. In addition, this case is principally about defendants’ conduct, not the purchasers’ conduct. As a result, the purchasers will need to introduce the defendants Merck and Glenmark, Glenmark’s partner Par, the individuals who negotiated the patent settlement with the reverse payment, and the financial consultants contacted about the no-AG agreement. While the defendants may not agree with all of the evidence that the purchasers present on these issues, they will not need to start from a blank slate in their case. Instead, in their case, they will be able to focus only on the areas of disagreement. The jury will already know the basics of FDA regulatory approval, patent litigation, and the economics of settlement agreements in the pharmaceutical industry. The jury will also know the main players in the Zetia patent litigation and settlement. For example, it is unlikely that the defendants will need to spend much time at all to introduce their principal witnesses like Mr. Paul Matukaitis, Vice President and Assistant General Counsel for Merck during the relevant time period and the principal negotiator for Merck during its settlement negotiations with Glenmark in May 2010, or Vijay Soni, President of Global Intellectual Property and Project

Strategy for Glenmark, and the principal negotiator for Glenmark. Defendants may present additional evidence about who these individuals are and what they did, but they will not need to introduce them to the jury.

Finally, experience in cases like this one shows that the plaintiffs' case takes significantly longer than the defendants' case. In post-*Actavis* reverse payment cases in which both plaintiffs and defendants have presented all of their evidence to the jury in the initial phase of the trial, the plaintiffs' case has been significantly longer than the defense case. For instance, in *Nexium*, in an initial first phase of the trial limited to proof of the reverse payment violation and causation, the plaintiffs offered 20 witnesses live and by video over the course of 18 days, and the defendants offered 6 witnesses live and by video over the course of 5 days. *In re: Nexium (Esomeprazole) Antitrust Litig.*, No. 1:12-md-02409-WGY, ECF Nos. 1138, 1151, 1153, 1154, 1155, 1156, 1157, 1159, 1160, 1165, 1179, 1181, 1182, 1310, 1312, 1314, 1315, 1316, 1317, 1319, 1376, 1377, 1378, 1380 (D. Mass.).² Similarly, in *Provigil*, in an initial phase limited to proof of the reverse payment violation, the plaintiffs offered 23 witnesses live and by video over the course of 8 days, and the defendants offered 6 witnesses live and by video over the course of 4 days.³ See *Apotex, Inc. v. Cephalon, Inc.*, No. 2:06-cv-02768-MSG, Trial Trs. at ECF Nos. 1267, 1268, 1269, 1270, 1271, 1272, 1273, 1274, 1275, 1276, 1277, 1278, 1279, 1280, 1281, 1282 (E.D. Pa.).⁴ And, most recently in *Opana*, in an initial trial phase limited to liability, the plaintiffs offered 23 witnesses live and by video over the course of 10 days, and the defendants

² On Day 19 of the *Nexium* trial, plaintiffs called their final witness and rested their case in chief in the morning, and defendants began to present their case. For simplicity, Day 19 is included as a full day in both the plaintiffs' and defendants' trial day counts.

³ A plaintiffs' expert testified on two of the four defense days due to a scheduling conflict.

⁴ The indices of the transcripts for each day are attached as Exhibit 1.

offered 6 witnesses live and by video over the course of 3 days. *In re Opana ER Antitrust Litig.*, No. 1:14-cv-10150 (N.D. Ill.), Trial Trs. at ECF Nos. 1011, 1012, 1013, 1014, 1015, 1016, 1017, 1018, 1019, 1020, 1021, 1022, 1023, 1024, 1025, 1026, 1027, 1028, 1029, 1030, 1031, 1032, 1033, 1034 (N.D. Ill.).⁵

For all of the foregoing reasons, the purchasers believe that it is most appropriate to allocate 60% of the total trial time to the purchasers' case, and 40% of the total trial time to defendants.

Dated: March 3, 2023

Respectfully submitted,

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⁵ On Day 11 of the *Opana* trial, plaintiffs called their final witness and rested their case in chief in the morning, and defendants began to present their case. For simplicity, Day 11 is included as a full day in both the plaintiffs' and defendants' trial day counts.

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